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GENERAL COUNSEL
OF COPYRIGHT

Before the
United States Copyright Office
Library of Congress

In the Matter of	)	
	)	
Notice and Recordkeeping for	)	Docket No. RM-2002
Use of Sound Recordings	)	
Under Statutory License	)	

DOCKET NO.
RM 2002-1
COMMENT NO. 3

Reply Comments of Collegiate Broadcasters, Inc.

Collegiate Broadcasters, Inc. ("CBI"), by counsel, hereby respectfully submits its reply comments in response to the *Notice of Proposed Rulemaking* (the "NPRM"), published in the Federal Register on February 7, 2002. These reply comments respond to the comments of the Recording Industry Association of America ("RIAA"), the American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") previously filed in this proceeding.

As in CBI's original comments, filed April 4, 2002, references to "stations" in these reply comments include all Educational and Community ("EC") stations that can demonstrate §501(c)(3) Federal non-profit tax-exempt status, with the exception of radio stations covered under the RIAA/CBP/NPR agreement ("CPB agreement"), including "webcast only" operations that meet the above criteria. For clarification, stations that are part of government operated learning institutions are also included.

I. Summary of CBI Original Comments

In our original comments, CBI stated that the proposed reporting requirements are so burdensome that, if they are adopted, most "web only" stations will cease to exist.[1] Licensed broadcast stations would also be forced to abandon current or planned webcasting activities.

CBI argued that EC stations are deserving of special consideration, because they are non-profit, noncommercial operations operating solely for the educational benefit of the students, volunteers, academic programs at Universities (and other non-profit institutions) and their audiences.

Further, CBI stated that if EC stations are not exempted from the reporting requirements, that an alternative exists. Typically, EC stations come under 37 C.F.R. § 253.5. This allows for sampling of stations by the Performing Rights Organizations ("PROs") for up to one (1) week per year. In practice, only BMI requests such reports, and for only a three (3) day period.

[1] Comments of WOBC, Oberlin College, Comment No. 24, at pg. 2 ("WOBC Comments"). This could extend to licensed stations as well.

In light of the CPB agreement[2] and the fact that the Copyright Office has considerable discretion in these proceedings (*See* C.F.R. § 114(f)(2)(A)), CBI requested an exemption, based on the fact that the vast majority of these stations have less than 10 full-time equivalent ("FTE") employees.[3]

Given the undue burden placed on EC stations as proposed in the NPRM and the discretion afforded the Copyright Office in this proceeding, CBI reiterates its request that EC stations be exempted from the reporting requirements or alternatively, require stations to meet the established reporting requirements similar to the present sampling system used in 37 C.F.R. § 253.5.

In reply to the comments filed by RIAA, AFM and AFTRA, CBI submits the following:

II. The Interim Rules Should Not be Considered When Determining Rules for EC Stations.

RIAA contends in its comments that "[t]he determinations made by the Copyright Office in the Original Determination provide guidance for the Copyright Office in this proceeding."[4]

In making those determinations and interim rules, broadcasters and EC stations, specifically, were not part of the dialogue that helped the Copyright Office establish those rules[5]. The dialogue focused on digital subscription transmission services, thus the operational nature and ability of these stations to report the ensuing interim requirements were not considered. Broadcasters typically webcast as a service to their audience. Webcasting is a late addition to the well-established practices of EC stations that does not require the level of recordkeeping proposed in the NPRM or adopted by the Copyright Office on an interim basis.

III. Consequences of enacting the proposed rules

"Any claim that detailed reporting requirements will destroy webcasters or any other digital audio transmission service if unfounded."[6]

Volunteer student radio stations that webcast are now discovering that they may be faced with an impossible burden based on rules developed for another type of service. Even Radio Broadcasters filing comments in this proceeding contend that their established practices are not

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[2] While many of the details of this private agreement are not subject to public scrutiny, some details have emerged. These details show it is obvious that stations with less than 10 full-time employees are EXEMPT from the reporting requirements. Those with 10 or more are only required to submit reports on a sample basis and only when reasonably possible. *See* http://stations.cpb.org/musicrights/about.php.

[2] 1.46 FTE average. *See* Joint Comments of College and University Radio Broadcasters Webcasting Under Statutory License, at pg. 4, footnote 5.

[4] RIAA Comments, at pg. 3.

[5] Comments were submitted in Docket No. RM 96-3B by the Recording Industry Association of America (RIAA) and three digital music subscription services operating in the United States: DMX, Inc. (DMX); Muzak, Inc. (Muzak); and Digital Cable Radio Associates/Music Choice (DCR) ("commenting parties").

[6] RIAA Comments, at pg. 4.

suited to meet the requirements set forth in the NPRM and the onus to comply with those requirements is unrealistically burdensome.

If the Radio Broadcasters are not able to cope with the burden of the proposed record-keeping requirements, it will be much worse for the typically small, volunteer, noncommercial, nonprofit broadcasters, as demonstrated by the following comments submitted in this proceeding:

- "The reporting requirements as proposed would be so burdensome for small community radio stations that all but a few would be forced to stop streaming their broadcast signal."[7]

- "If the proposed rules were to be made final without change, WHRB would have to cease webcasting immediately"[8]

- "In fact, WOBC would probably have to hire someone to gather the requested information if we wanted to continue webcasting, and our budget (which is allotted yearly by the Student Finance Committee) would not cover this expense."[9]

- "The Office's proposal would impair realization of broader educational objectives through webcasting."[10]

- "Such an imposition would be a substantial burden for stations with five to ten people. It would be crippling for a station with a staff of only two or three."[11]

- "The reporting requirements are so onerous to non-profit entities like Mayflower that they could cause stations like WMHB to cease to exist."[12]

- "Each of the College Broadcasters reports that the excruciatingly high costs of compliance with the recordkeeping requirements alone, without factoring in the cost of the related annual royalty payments, would likely require each of the College Broadcasters to cease operation of their streaming activities."[13]

It is clear from these statements that the lack of comments from EC stations during the creation of the interim rules has resulted in proposed rules that are clearly prejudicial to EC stations.

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[7] Comments of the National Federation of Community Broadcasters, Inc., Comment No. 17 at pg. 4 ("NFCB Comments").
[8] Comments of Harvard Radio Broadcasting Company, Comment No. 33 at pg. 11 ("WHRB Comments").
[9] Comments of WOBC, Oberlin College, Comment No. 24, at pg. 2 ("WOBC Comments").
[10] Comments of Intercollegiate Broadcasting System, Comment No. 32, at pg. 3 (the "IBS Comments").
[11] Comments of the Adventist Radio Broadcasters Associtation, Comment No. 27, at pg. 3 (the "ARBA Comments").
[12] Comments of Mayflower Hill Broadcasting Corporation, licensee of WMHB at Colby College in Waterville, Maine, Comment No. 15, at pg. 1 ("WMHB Comments").
[13] Joint Comments of College and University Radio Broadcasters Webcasting Under Statutory License, Comment No. 21, at pg. 20 (the "College Broadcasters Comments").

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Applying either the interim rules, the more burdensome rules proposed in the NPRM, or those suggested in the RIAA comments would signal the end of webcasting by EC stations.

Six of the seven comments that were submitted by stations and organizations that we consider similar in nature (NFCB, Mayflower, WHRB, IBS, WOBC, College Broadcasters and ARBA) specifically asked for an exemption (as did CBI) and suggested that sampling could be a reasonable alternative to the census method proposed.

IV. Response to RIAA's Comments on Need for Detailed Reporting

RIAA contends that detailed reports concerning every song played are necessary for "royalty collection and distribution and enforcement of statutory requirements."[14] These detailed reports being sought by the RIAA far exceed those required of stations for other royalty and distribution entities. Under current rules, "A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports."[15] In practice, only BMI surveys stations, for only a three day period, and stations may submit handwritten logs.[16]

The minimal amount of information available for public scrutiny in the CPB agreement provides evidence that the RIAA itself deems sampling an acceptable method of reporting. Stations with ten or more full-time employees are subject to sample reporting, not census reporting.[17]

A report on salaries[18] at public radio stations also reveals the operating budgets of these stations to be far in excess of their "cousin" student operations. Of the 327 CPB stations reporting, nearly 80 percent had annual budgets in excess of $450,000. Meanwhile, College Broadcasters claim to be among the best funded stations among their peers with average budgets of slightly over $98,000.[19] IBS claims their members have an average annual budget of $9,000.[20] If the RIAA was persuaded that the CPB stations can not afford to implement the requested means for reporting on a census basis and can even be allowed a "reasonably possible" escape clause for sample reporting for stations with ten (10) or more FTE staff, then certainly CBI members and other EC stations with even less staff[21] should be afforded a total exemption,

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[14] RIAA Comments, at pg. 5.

[15] 37 C.F.R. § 253.5.

[16] Attached as Exhibit A is a sample BMI log.

[17] "Second, unless not reasonably possible, any radio station with 10 or more employees must, for all streams: (1) in 2003, provide reports to the RIAA regarding music used within at least a two-week period in each calendar quarter; and (2) in 2004, provide reports to the RIAA regarding music used within a period of not less than one week in each month." *See* http://www.stations.cpb.org/musicrights/about.php. Stations with less than 10 FTE are EXEMPT from reporting. Even here the language states that it may not be "*reasonably possible*" for these stations to provide the requested sample reports. Clearly, the RIAA understands the burden the proposed recordkeeping requirements pose to those stations.

[18] "Salary Report for Public Radio Stations 2000". *See* http://www.cpb.org/pdfs/salary/sal_radio.pdf.

[19] College Broadcasters Comments, at pg 2., footnote. 2.

[20] IBS Comments, at pg. 3.

[21] According to footnote 5 on page 4 of College Broadcasters comments, the average is 1.46 FTE.

regardless of FCC license status.[22]

The second part of the RIAA's contention is also problematic. The RIAA states that the only way to "give meaning" to the right of the copyright holder, with respect to the content restrictions (statutory limitations) "is to require the reporting of comprehensive data of each sound recording..."[23] The RIAA plainly states its intention to "catch" services that do not adhere to the programming restrictions, notably the restrictions on archived material and the sound recording performance compliment. The sample method that the RIAA agreed to in the CPB agreement calls into question the *need for this information*. Further, nothing in the record suggests that services affirmatively confirm the compliance, particularly when doing so would be unduly burdensome.

V. The RIAA's Statements Clearly Demonstrate a Lack of Understanding of Educational and Community Stations/Webcasting Operations.

RIAA makes several sweeping statements about broadcasting services, which are not generally applicable to EC stations. RIAA states "[i]t is the service that obtains the recordings, "rips" those recordings to make reproductions for a database from which transmissions are made and enters meta data for those sound recordings so that they are identifiable in the database."[24]

Many stations operate "traditional" radio studios and physically handle the media (CDs, Records, Tape) in order to broadcast. The audio for the webcast is supplied by the studio, not from a computerized system. Some stations do utilize computer systems to automate during school breaks or to teach students about practices in many commercial stations. This, however, is a far cry from what the RIAA characterizes as the norm. Moreover, none of the systems on the market today, to the best of our knowledge, come close to providing the data fields proposed in the NPRM. Even if the software providers undertook the steps to rewrite their code to allow stations to comply, these changes would not happen overnight. Once such an upgrade (which is not likely to be free) is installed, it could literally take years for these volunteer stations to enter the available data. Even then, this does not solve the problem for stations without these systems. These stations should not be forced to change the nature of their operation, expend large sums of money and volunteer hours, solely for the purpose of complying with overly burdensome rules just to pay the "minimum" fee.

Some of the comments submitted by other EC stations support the assertion that EC stations do not use computerized operations:

- "Almost all of WOBC's programming is done live on the air, with programmers often deciding on the spur of the moment what to play next. There is no such thing as

[22] As is demonstrated later, RIAA makes assumptions about services that don't apply to most Educational and community stations. This is particularly true in the case of "webcast" only stations and stations which are required by their FCC license to share their frequency with other broadcasters. In such cases, these stations would be liable for two separate fee schedules and reporting requirements for programming originating from same organizations utilizing the same facilities.

[23] RIAA Comments, at pg. 16.

[24] RIAA Comments, at pg. 8.

an intended playlist at WOBC, and we do not have our record library indexed in a computer database."[25]

- "Secondly, WHRB stores its sound recordings in physical format (on LPs, CDs, cassettes, etc.) and encodes them digitally in real-time at the time of transmission."[26]

- "WMHB does not have the computerized systems generally found in many commercial and CPB-funded public radio stations..."[27]

RIAA also claims "[s]ervices already use computer algorithms and programming software to deliver music to listeners."[28]

This claim is not substantiated with respect to EC stations. While these computer algorithms and software packages are often found in commercial stations, the same cannot be said for EC stations. The nature of the programming, in many instances, precludes the use of such a system. Many of these stations attract volunteers because they allow the DJ's to select their own music and intentionally avoid the methods and systems adopted by mainstream commercial stations.

RIAA also states that "[d]etailed reporting would also not appear to be problem for many terrestrial broadcasters simulcasting their AM or FM signals over the Internet. According to a story in the Wall Street Journal on Monday, February 25, 2002, many stations already use software and hardware that could be utilized to provide the data set forth in the proposed regulations."[29]

This article referenced the practices of Clear Channel Communications, which operates about 1,225 stations nationwide. This is hardly representative of EC stations. These stations do not possess and cannot afford to possess the level of sophistication of Clear Channel. Even Clear Channel claims it is impossible to comply with the recordkeeping requirements.[30]

RIAA further states that, "[i]f companies streaming music on the Internet are sophisticated enough to digitize entire libraries of music to offer their listeners thousands of distinct recordings, develop technologies to strip out local commercials from over-the-air transmissions in order to replace them with Internet-only commercials for a worldwide audience, and create distinct streams for individual users, then they are capable of developing or purchasing automated systems that will enable them to provide the information that copyright owners need to distribute royalties to each and every copyright owner, artist and non-featured musician and vocalist entitled to receive such royalties and enforce their statutory rights."[31]

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[25] WOBC Comments, at pg. 1.
[26] WHRB Comments, at pg. 9.
[27] WMHB Comments, at pg. 1.
[28] RIAA Comments, at pg. 40.
[29] RIAA Comments, at pg. 42.
[30] Radio Broadcasters Comments, at Appendix B, pg. 2.
[31] RIAA Comments, at pg. 43.

This is a broad statement, which unfairly encompasses EC stations. Many EC stations do not digitize entire libraries or even portions of their libraries. Nor do they strip out commercials (as most are licensed by the FCC as non-commercial, educational stations). Many stations lack the resources to develop or purchase automated systems to provide the requested data.[32]

RIAA also states that "[c]ertain services are already required to enter album, artist and song title information into a programming database in order to comply with the statutory requirement to display such information during the transmission of the sound recording."[33]

This information can be entered and displayed as needed and does not necessarily need to be pulled from a database. There are also exceptions to this rule. For example, it is not applicable when a retransmission of a broadcast transmission is made by a third party. Moreover, the rule also provides an exemption for cases where the technology does not support the requirement. At present, to the best of our knowledge, most players on the market do not support this "feature" for *live* streams. For example, neither Real Audio nor Windows Media transmitting software provide a means to update these fields in a *live* broadcast.

VI. How are Performances Counted?

In section F(2) of RIAA's comments, the RIAA goes to great lengths to provide examples of ways a service could report "how many users were connected during the transmission of each sound recording". The CPB agreement demonstrates that it is not necessary to know how many "performances" were made per song. In both instances (stations exempted from reporting and those asked to sample if "reasonably possible"), the only way to calculate the royalty due from CPB stations would be to use a variation the estimate method proposed by the RIAA and the CARP.[34] This method suggests multiplying the Aggregate Tuning Hours ("ATH") by a specified number of performances per hour. In practice, stations could use the actual number of recordings used. While CBI does not know the details of the CPB agreement, this is the only method we could deduce for payment, other than a flat fee or an exemption.

Even if this model is ultimately adopted by the librarian, it is problematic for many EC stations due to the costs involved. Methods of streaming audio on the Internet vary widely. Two of the common software services that allow stations to stream (Real Audio and Windows Media) do not report ATH. While there may be other solutions available for stations using these software solutions, the least expensive found, would cost these stations $2500 per year[35]. This expense is disproportionate to the royalty fees to be assessed, especially when you consider that most are not likely exceed the listener levels needed to reach the CARP proposed minimum fee of $500.

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[32] "If and when an appropriate software program is available, there remains the question of whether its cost will be reasonable and affordable for small noncommercial radio stations." ARBA Comments, at pg. 3.

[33] RIAA Comments, at pg. 46.

[34] *See* CARP Report, at pgs. 109-110.

[35] This is the minimum cost quoted from Measurecast.

VII. Uniform Report of Use

While such a log (report) would be unnecessary if stations are exempted, as justified in CBI's comments, we feel it is necessary to address the proposed report in case the Office decides that some minimum level of reporting is required for these stations.

While it would certainly help any entity that wanted to collect data to have it reported in a uniform fashion, the elements of the form which are to be completed must be reasonable and serve the intended purpose. CBI contends that the requested data is unreasonable and exceeds the intended purpose. CBI did not specifically address many of the proposed items in the NPRM in its initial comments, because it did not understand the need for some of the items to allow Collective(s) *to collect and distribute royalties*.

After reviewing the RIAA comments and their proposed changes to the data required in the NPRM, the need for the most of data still perplexes CBI. The availability of the data is also problematic. Below is the list of RIAA proposed data and CBI's comments on the merits of each proposed item.

A. Review of the data proposed by the RIAA

Service Name:

This information is necessary, but it is redundant to include this data field on every line of a report, particularly if the reports are not computer generated. Even if the reports are computer generated, this data could be included in a header for each page or each segment.

Transmission Category:

This information is not necessary. Once a service has filed a "Notice of Use", this information will already be available to the Collective(s).

Channel or Program Name:

This information is not necessary for station simulcasts. The Notice of Use can provide this information and be included in the Collective(s) database and linked to the service name.

Type of Program:

This information is not necessary for the collection and distribution of royalties when the service is a station simulcast.

Influence Indicator:

This information is not necessary for the collection and distribution of royalties at present, nor would it be required if the circumstances envisioned by the RIAA come to pass. The

RIAA proposes this field simply based on its belief that certain services may, at some future date, be deemed interactive[36]. To require a data field on this premise makes no sense. Even if RIAA's proposals were adopted, this information could be required in the Notice of Use and linked to the Service Name in the RIAA database.

Genre:

This information is not necessary. The justification offered by the RIAA is to help differentiate between songs with similar names. Even if the RIAA can justify the need, stations can simply identify the type of programming offered on the station (i.e. College) one time and have this information linked to the service name.

Start Date and Time of Sound Recording's Transmission.

If census-style and not sample-style reporting is used, this information is not necessary. The only possible use for this information under census-style reporting would to be monitor compliance with the sound recording performance compliment. Services are not required to demonstrate compliance.

If sample-style reporting is employed and a reasonable method for calculating the performances is not identified, this field could be modified to "Day Part" to provide some weighting to properly distribute royalties. Even then, the value of this information is questionable, since Internet transmissions travel across time zones.

In both scenarios, the date of transmission has no value in the collection and distribution of royalties.

The RIAA contends that this information does not create a material burden for services. That statement does not account for the various methods used to transmit sound recordings by various services and, in particular, EC stations.

Total Number of Performances:

This data field was not included in the NPRM and is not necessary. It also presupposes the acceptance of the CARP Report by the Librarian of Congress. This field is unduly burdensome for EC stations. As discussed, it is already disproportionately (and in some cases prohibitively) expensive for stations to report ATH. The cost to implement a system to report performances per song is unknown and likely to far exceed the cost of the "simple" software used to calculate ATH mentioned earlier. A survey of vendors revealed no off-the-shelf solutions for applications like Windows Media and Real Audio. The RIAA description of the process makes it appear that reporting such data is simply a matter of turning on a software option in a hypothetical system. The RIAA offers no real world examples of how this would be implemented and provides no examples of applications that could generate this data. The RIAA makes no accommodations for services like EC stations that do not store their playlist data in a

[36] *See* RIAA Comments, at pg. 51.

computer.

Artist Name:

This information is necessary for services that are not exempt.

Sound Recording Title:

This information is necessary for services that are not exempt.

Album Title:

This information is not necessary in most instances, and in many cases is not available to the services. This field should be optional.

The RIAA stops after these three sound recording data fields to remind us that this information is required under the Original Determination and cannot place any extra burden on services as they are already required to display this information. While CBI does not argue the validity of the need for this information, *when provided*, it is incumbent to point out that the citation (footnote 12, page 56 of the RIAA comments) provided by the RIAA is not complete and does not contain the statutory language regarding an exemption for technological limitations. Also, on page 55 of its Comments, the RIAA again fails to fully inform the reader about the limitations and exclusions of 17 U.S.C. §114(d)(2)(C)(ix)[37].

International Standard Recording Code ("ISRC"):

The ISRC is a code embedded into "promotional and commercially released" product. The RIAA Comments and a visit to their web site (http://www.riaa.org/Audio-Standards-3.cfm) are revealing.

The RIAA is the U.S. administrator for the ISRC for which "implementation is occurring on a national level with international effects." Thus one can deduce that this is not fully implemented, and that numerous station libraries are full of recordings that do not contain an ISRC.

The RIAA makes no mention as to how a service would read the ISRC that is embedded in a recording. The web page also does not make mention of who profits from the "cost effective" implementation of the code, nor does the web page or the RIAA Comments call the use of the code a standard.

Also, "backstock" can be assigned an ISRC. In those instances, stations would be

[37] This section states "shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace."

required to access a database to locate the ISRC, yet such a database is not available commercially.[38]

Track Label (P)-Line:

This information is not necessary where the album title is available.

Duration of Sound Recording:

This information is not necessary. The only justification the RIAA gives is to differentiate between remixes of the same song. This information is included in the Sound Recording Title and will be reported in the Sound Recording Title field and need not be derived in a less direct manner.

Marketing Label:

This information is not necessary. The RIAA states in its comments that in many cases, this information is the same as the Track Label (P)-line and thus is redundant in many cases[39]. In cases where the album name is provided, the Collective(s) should be able to determine both the (P)-line and the Marketing Label. The additional burden on stations to locate both pieces of information and to backfill this information is enormous when compared to the nominal changes in royalty distribution that might result if this information is not present.

Catalog Number:

This information is not necessary. If the artist, title and album (where available) are provided, this information is redundant.

UPC:

This information is not necessary and not readily available to the services, without seeking third party help. Stations receive promotional copies of newly released sound recordings, because the labels want the exposure that airplay provides. It is common practice for someone in the distribution chain to destroy the UPC code before the promotional copy arrives at stations. It is unreasonably burdensome to require stations to seek third party help in finding this information for nearly every recording that comes through the door. Moreover, the libraries of stations are full of material that predates the use of UPC codes.

Release Year:

This information is not needed and the required work to retrieve this data would be considerable and provide nominal benefit to the Collective. Even now, this information is not

[38] RIAA states that "The ISRC can be plugged into a sound recording database, should *such a database be made available commercially*..."(emphasis added). RIAA Comments, at pg. 57.
[39] *See* RIAA Comments, at pg. 58.

universally available to services on the media they receive.

B. Pre-Licensed Material

Neither the NPRM nor the RIAA Comments provide any means for a service to report that a sound recording is being used under a separate license obtained by the service. The CARP, on page 108 of their report, and the RIAA agree that pre-licensed recordings would not be items for which the Collectives could collect and distribute fees, but there is no method for a service to indicate that a particular recording is not subject to a fee distribution to a Collective. This is particularly troublesome for EC stations who tend to program a high percentage of unsigned artists and other material not covered by the RIAA.

C. Less than Perfect Data Will Hinder Distributing Data to "Lesser Known Performers".

To what extent this data additional might help distribute royalties is not known. What is known is that none of the artists will be compensated if EC stations cease to webcast. A balance is needed which will allow stations to continue to serve the public, educate its volunteer members and provide important exposure and revenue to up and coming performers.

D. Proposed Data is Not Provided.

The RIAA admits that promotional material often fails to contain the proposed data that they wish to collect.[40] The RIAA then suggests it is the responsibility of the service to research the information, which the labels themselves failed to provide. This is evidence that the information requested is readily available and not unduly burdensome for stations to report. The unintended consequence here might be that a station won't play a sound recording due to the lack of required data. This scenario benefits the RIAA, because their well-established members are more likely to include this information than the unsigned artist or small independent label.

E. Ability of Stations to Report Data.

If the Copyright Office does not exempt stations from the reporting requirements, and instead opts to require reporting on a sampling basis, stations must be given an opportunity to come into compliance. CBI recently surveyed 49 stations and found that 37 percent do not currently keep a comprehensive playlist in any form, except when reporting to the PROs. Further, only 8 percent reported any type of computer use for basic broadcast-style playlists.

If it is determined that reports will be required and a standard format for reporting is established, these stations will need to procure the funding to purchase the needed software and hardware to create the reports. These stations generally are allocated operating funds once a year. Thus the ability of these stations to include a request for hardware and undetermined software this year will have already come and gone when the Copyright Office issues its decision. That means it will take at least one year for EC stations to request the funding, which, if approved,

[40] *See* RIAA Comments, at pg. 44.

will not be available for disbursement until the following academic year. Then these stations need the time to install the systems, enter test data, test the systems and develop procedures that would allow them to comply with recordkeeping requirements.

It may be argued that stations have had reasonable time to procure the hardware while these matters were under consideration at the Copyright. Given the limited resources of EC stations, it would not have been prudent to purchase hardware to be used with undeveloped software for an application that may not be required.

F. RIAA Comments Suggest a Different List than the NPRM

We have examined the RIAA's proposed elements for an intended playlist. It is important to note that the RIAA list of data differs from the NPRM in some areas. The following were not included in the RIAA initial comments.

Time Zone

This information is not necessary to collect and distribute royalties. Even if it were, this item would provide data that is meaningless.

Numeric designation of song in an archived program.

This information is not necessary for the collection and distribution of royalties. What information can be gleaned from this that would aid the Collective(s)?

G. Conclusion Regarding Proposed "Intended Playlist" Data Elements

After evaluating all the data fields proposed by the RIAA and those of the NPRM, CBI concludes that if EC stations are not exempt from the reporting requirements and must alternatively submit sample reports, that the only fields which are relevant, readily available and not overly burdensome are Service Name, Artist Name, Sound Recording Title and where available, Album Title and Marketing Label.

This list of data provides the Collective(s) with enough data in almost every instance to collect and distribute royalties. The RIAA (Sound Exchange) must have developed a large database and must be in the process of continuing to build and refine this database of sound recordings as it collects reports of use. This asset will further enable the Collective(s) to appropriately distribute royalties. Conversely, EC stations generally have no such database and in the instances where one exists, it is not populated with all the fields that the NPRM and the RIAA request. It would be reasonable for the final rules to allow the RIAA to ask stations for additional information, where available.

VIII. Flawed Procedure

A number of commenters[41] suggested that this process is procedurally flawed. While CBI will not comment on the merits in those suggestions, it believes the Copyright Office must reach a just determination with the information available, in order to serve all parties. The small webcasters who have submitted comments in these proceedings, have likely have stretched their resources to participate in this process and may not have the resources to start the process over again. It is therefore important for the Copyright Office take into account the arguments of improper process. In its conclusion, the Copyright Office must give appropriate weight to questions of procedure and issue a decision that reflects what the proper process would have yielded.

IX. Ephemeral Logs:

This log is not necessary and it is redundant. In the CARP proposal, the fee for Ephemeral buffer copies used to create transmissions is a simple percentage of the overall fee, thus a log offers no information concerning use that would change how royalties are collected and distributed. Moreover, this log is redundant of the information in the Uniform Report of Use/Intended Playlist, with two exceptions. The information concerning the creation and destruction of copies is the only new data. In the case of transmissions, creation and destruction are simultaneous. As noted in the previous CBI Comments, we feel the fee itself is unwarranted for buffer copies that are solely used to enable transmissions.

The only remaining justifications offered by the RIAA are to demonstrate compliance with the statute and a hypothetical manner in which to distribute royalties. No affirmative action is required of the services to demonstrate compliance. Requiring services to provide a log simply to allow the RIAA, at a later date, to change its mind concerning royalty distribution is not appropriate, particularly given the redundant nature of the data and the simultaneous creation and destruction of the "copies".

X. Listener Logs:

The RIAA has dropped its request for listener logs. CBI requests the Copyright Office honor the RIAA's request. These proposed rules required the use of undeveloped technology that would provide questionable results.[42] Additionally, the listener log would have an impact on listeners who would wonder about privacy issues, regardless of whether there is any basis for concern.

XI. AFTRA/AFM Comments

The request of AFTRA and AFM are simply beyond the capabilities of the EC stations. EC stations are not able to comply with the data requested in the NPRM. This additional request

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[41] *See, e.g.*, Radio Broadcasters Comments, at pg. 2.

[42] Several commenters discussed the inability of IP matching to provide accurate information concerning the location of the listener.

for information likewise cannot be accommodated. Moreover, the RIAA, a primary Collective, does not request this information and notes that there is an independent administrator that is building a database to extrapolate the information concerning non-featured performers. Thus, this information is not necessary to report and stations could not reasonably be expected to add this information due to the constraints already discussed.

XII. Webcast-Only and Time Shares

CBI and other commenters have, almost without exception, agreed that the recordkeeping requirements for these stations are overly burdensome, unrealistic and in most cases, if implemented would cause these stations to cease their webcasting activities. CBI's definition of stations *did not exclude* webcast-only stations that meet the established criteria. CBI restates this here for clarification and offers reasons to include these stations in the requested exemption from the recordkeeping requirements and a blanket (flat) fee.

Webstations at colleges and universities tend to be a student-funded activity that is a co-curricular social activity focusing on either music or an academic program. There are also many stations that are a hybrid of the two models. The basic purpose for the existence of these stations tend to drive them to maintain a traditional broadcast studio, which involves broadcast consoles, CD players, microphones and other studio equipment. Thus, these stations are just as limited in their ability to comply with the proposed recordkeeping in the NPRM or the RIAA's comments as stations with a license. In fact, the reason many of these stations are webcast-only is a lack of resources to obtain an FCC license. In other cases, the lack of available an frequency makes obtaining an FCC license impossible.

There is also a subset of stations that are AM/FM simulcasters part of the day and webcasters during the other part of the day. This is due to limited spectrum availability and a negotiated "time share" of a frequency with another broadcaster. The ability to webcast when not broadcasting over the air offers these stations and their students added access to the educational resources, which would otherwise sit unused or underutilized. [43]

The webcast-only and time-share stations deserve to be treated the same as their FCC-licensed counterparts, because, by and large the only difference in their operations is the method used to transmit. It would be unfair to treat these otherwise identical operations differently, particularly when the web-only stations tend to be less financially secure, and have fewer members due to the lack of over-the-air transmissions.

XIII. Conclusion

Educational and Community stations, such as those that are members of Collegiate Broadcasters, Inc., are not able to comply with the proposed reporting requirements as put forth in the NPRM or in the RIAA's initial comments. While some elements of the "intended playlist" seem only to be present to provide affirmative proof that a service is in compliance with certain content restrictions (Sound Recording Complement and restrictions on archived material) and the

[43] See Exhibit B.

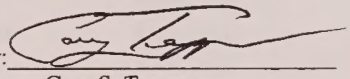
Copyright Office has *read into the statute* the belief that it was the intent of Congress for the playlists to confirm compliance, CBI respectfully disagrees. Even so, the data that CBI contends is readily available and not overly burdensome provides *reasonable assurances* that these content restrictions are not violated.

CBI requests an exemption from the recordkeeping requirements due to the burden placed on the EC stations. The publicly available data from the CPB agreement confirms that this is not unprecedented or unreasonable. Alternatively, CBI submits that if EC stations are required to report on a sample basis, the required data should be limited to Artist, Sound Recording Title and where available and reasonable, Marketing Label and Album Title. We urge the Copyright Office to consider the limited benefit that will be accrued to copyright holders by forcing EC stations to report, given the burden placed upon these stations to produce anything but a handwritten log, once a year.

If Educational and Community stations are not exempted, from the reporting requirements, they must be afforded a reasonable time frame, given their limited resources and budgeting constraints, to come into compliance.

Respectfully submitted,

Collegiate Broadcasters, Inc.

By: 

Cary S. Tepper,
Its Counsel

Booth, Freret, Imlay & Tepper, P.C.
5101 Wisconsin Avenue, N.W.
Suite 307
Washington, D.C. 20016
(202) 686-9600

April 26, 2002

CBI Members

WAWL FM
Chattanooga State
Technical
Community College
Chattanooga, Tn. 37406

KSBR
Saddleback College
Mission Viejo, CA 92692

WUEV-FM
University of Evansville
Evansville, IN 47722

WXUT
University of Toledo
Toledo, OH 43606

KPNI Radio
Southern Methodist
University
Dallas, TX 75275-0456

WBSU
SUNY Brockport
Brockport, NY 14420

KBVR FM & TV
Oregon State University
Corvallis, OR 97331

WSIA
College of Staten
Island/CUNY
Staten Island, NY 10314

WICB and VIC 106
Ithaca College
Ithaca, NY 14850

KSYM-FM
San Antonio College
Radio
San Antonio TX 78212-
4299

WVGS/FM 91.9
Georgia Southern
University
Statesboro, GA 30460

KDNE
Doane College
Crete, NE 68333

WPTC-FM
Pennsylvania College of
Technology
Williamsport, PA 17701

89.9 FM KTSW
Southwest Texas State
University
San Marcos, Texas

WBCX
Brenau University
Gainesville GA 30501

WCVM-AM/CaFM
SUNY Morrisville
Morrisville, NY 13408

WMUL-FM
Marshall University
Huntington, West Virginia
25755-2635

WFNP 88.7FM
SUB 309 SUNY
New Paltz, NY 12561

WSUM-FM 91.7
602 State St #205
Madison, WI 53703

KTUH-FM 90.3
University of Hawaii at
Manoa
Honolulu, Hawaii 96822

KAMP Student Radio
University of Arizona
1230 N. Park Ave. Suite
#201
Tucson, AZ 85721

KVRX
University of Texas
Austin, Texas 85721

WHRB
Harvard Radio
Broadcasting
Cambridge, MA 02138

EXHIBIT A
Sample BMI Log

BMI College Radio Log

Page # _____

Instructions:
Completed daily logs should show all programs, sign-on to sign-off. Typed logs are preferred but legibly printed logs will be accepted.

Musical Selections:
List every selection played together with name(s) of writer-composer and artist.

ALBUMS: List every selection played. Include writer-composer and artist. Do not give album title or number of cut.

THEMES: If a song is used as the theme of a show, indicate in "theme" columns whether used to open or close or both. If the theme comes from a background library indicate title and name of library in the writer-composer column.

Automated, Packaged and Transcribed Programs:
Identify name of service. Copies of aired playlists may be submitted. Please be sure air date and list number are included. Line out all music not aired.

Satellite Broadcasts:
Identify name of program along with originating source.

Do Not List:
Jingles, commercials, spot announcements.

PLEASE GIVE ON EACH PAGE:

Call Letters:	Date:

Time	PROGRAM NAME	SONG TITLE	THEME Open	THEME Close	NAME OF WRITER(S)/ COMPOSER(S)	ARTIST

Please return completed log in envelope provided. Discard unused logging pages.

04/25/2002 16:25 4 ACADEMIC ADVISING PAGE 01

EXHIBIT B
Letter from Webcasting Station

Ithaca College Broadcasting
Roy H. Park School of Communications
118 Park Hall
Ithaca, NY 14850-7255

To Whom it may concern,

Ithaca College's 106-VIC is one of two student operated radio stations in the Roy H. Park School of Communications. The station operates during the academic year, as it has since 1957. 106-VIC is not an FCC licensed station and does not broadcast in the traditional sense. Its signal is carried on the local Time-Warner FM cable lineup and it transmits via radiating cable to seven residence halls on campus. In 1997, 106-VIC began streaming its live signal on the Internet, enabling parents, friends, prospective students and an online audience to listen to the station. The server that streams the signal of 106-VIC, WICB and Ithaca College Television can accommodate sixty simultaneous streams.

VIC''s music format is a pop/alternative hybrid, with nearly a dozen specialty shows, ranging from obscure British pop music, to heavy metal, to dance and Hip Hop.

Because 106-VIC is student operated with only one full time employee (the College's manager of radio operations), the proposed record keeping and reporting requirements, would make it impossible for the station to continue streaming on the Internet. With thousands of titles in our library, hundreds of person hours would be required for data entry. It would be a practical impossibility to provide information on the music, which comes from LPs and compact discs.

106-VIC began marketing itself as an Internet station after going online From our own research, we know that only a small percentage of our listeners are FM cable users. Having to remove the stream from the Internet would deny a staff of nearly 75 students the opportunity to share their enthusiasm for music and radio with their audience. We have no quarrel with the goal to compensate artists, but we believe the record keeping and reporting requirements are onerous and unfair to small webcasters.

Sincerely,

Christopher M. Wheatley
Manager, Radio Operations
326 Roy H. Park Hall
Ithaca College
Ithaca, NY 14850

(607) 274-3142

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ATTORNEYS AT LAW

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TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

STAMP & RETURN

RECEIVED
APR 26 2002
GENERAL COUNSEL
OF COPYRIGHT

April 26, 2002

VIA HAND DELIVERY

Mr. David O. Carson
Office of the General Counsel
U.S. Copyright Office
Library of Congress
James Madison Building, Room LM-403
101 Independence Ave, S.E.
Washington, D.C. 20559-6000

Re: Reply Comments to Notice of Proposed Rulemaking Dated February 7, 2002

Dear Mr. Carson,

On behalf of the college and university broadcasters identified in the attached (the "College Broadcasters"), we submit herewith an original and ten (10) copies of the Reply Comments of the College Broadcasters in connection with the above-referenced rulemaking regarding recordkeeping requirements for webcasting under statutory license.

If you have any questions in connection with these comments, please contact me.

Respectfully submitted,

Margaret L. Miller

Margaret L. Miller

Enclosure

STAMP & RETURN

Before The
COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

RECEIVED
APR 26 2002
GENERAL COUNSEL
OF COPYRIGHT

In the Matter of Rulemaking	)	
Notice and Recordkeeping for Use of Sound Recordings Under Statutory License	)	Docket No. RM 2002-1

REPLY COMMENTS OF COLLEGE AND UNIVERSITY RADIO BROADCASTERS
WEBCASTING UNDER STATUTORY LICENSE

The undersigned college and university broadcasting stations (the "College Broadcasters"), by their attorneys, submit these Reply Comments pursuant to the Copyright Office's (the "Office") *Notice of Proposed Rulemaking*, published at 67 Fed. Reg. 5761 (Feb. 7, 2002) ("NPRM"). The NPRM concerns the notice and recordkeeping requirements under the statutory licenses for webcasting in Sections 112(e) and 114(d)(2) of the Copyright Act, 17 U.S.C. §§ 112(e) and 114(d)(2). These Reply Comments respond to the initial comments filed by the Recording Industry Association of America, Inc. (the "RIAA") and the initial comments filed by the American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") on April 5, 2002.[1]

[1] Comments of the Recording Industry Association of America, Inc., *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 30 (Apr. 5, 2002) ("RIAA Comments"). Comments of the American Federation of Musicians of the United States and Canada and the American Federation of Television and Radio Artists, *Notice of Proposed Rulemaking*, Docket No. 2002-1 Comment No. 28 (Apr. 5, 2002) ("AFM/AFTRA Comments").

DISCUSSION

I. Response to Initial Comments of the RIAA.

A. The Office Should Not Accept the Reporting Requirements of the Interim Regulations as the Basis for the Proposed Regulations.

The RIAA argues that the interim regulations for pre-existing subscription services adopted by the Office in 1998 (the "Interim Regulations") should be the starting point for the proposed recordkeeping requirements because much of the data requested in the proposed regulations are similar to the data requested under the Interim Regulations and the services subject to the reporting under the Interim Regulations allegedly have not been hindered by compliance with such requirements.[2] The Office should reject this argument because the proceedings that led to the Interim Regulations did not include representatives of the services currently affected by the proposed regulations, the requirements under the proposed regulations are not identical and the RIAA provides no evidentiary support that the services have been able to comply with the Interim Regulations without any hindrance.

The argument of the RIAA that the Interim Regulations should be accepted as the basis for the proposed regulations implies that the webcasting industry and its players are the same today as at the time of the proceeding for the Interim Regulations: "[N]either the Copyright Office nor those entitled to royalties should be required to expend precious time and money in this rulemaking revisiting issues that the Copyright Office decided nearly four years ago, after an in-depth rulemaking proceeding."[3] Clearly, the webcasting industry today is dramatically different from the webcasting industry in 1996 when the Office first requested comments on

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[2] Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1989).

[3] RIAA Comments at 8.

notice and recordkeeping requirements and the Office received only a handful of submissions.[4] The number and types of entities that have entered the webcasting industry and now have a direct and substantial interest in the outcome of the Office's decision have significantly increased. Many of the services currently webcasting were not webcasting at the time of the Office's call for comments that led to the Interim Regulations. In addition, at the time the Interim Regulations were under consideration, broadcasters streaming their signals on the Internet believed that they were exempt from having to obtain a statutory license to engage in their webcasting activities.[5]

Streaming broadcasters (of which the College Broadcasters are a subset) contend that the exemption under Section 114(d)(1)(A) of the Copyright Act, relating to nonsubscription broadcast transmissions, applies to the public performance of sound recordings by AM/FM radio broadcasters when they stream their over-the-air broadcast signals over the Internet.[6] Broadcasters believe that the exemption applies regardless of the medium of transmission. As a result, broadcasters and a large number of the current players in the webcasting industry did not participate in the proceedings that led to the adoption of the Interim Regulations. For this reason, we urge the Office to reject the RIAA's implication that the previous rulemaking fairly represented the interests of all services currently webcasting, particularly the interests of the College Broadcasters.

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[4] The Office issued a Notice of Proposed Rulemaking on May 13, 1996 requesting comments on notice and recordkeeping requirements for digital transmissions of sound recordings. The Office received a total of four comments and three reply comments, from RIAA and three digital music subscription services. *See* Notice and Recordkeeping for Subscription Digital Transmissions, 62 Fed. Reg. 34,035, 34,036 (June 24, 1997).

[5] A group of commercial broadcasters are still arguing this issue in an appeal to the United States Court of Appeals for the Third Circuit from a decision in the Eastern District of Pennsylvania affirming a December, 2000 Office decision that the simultaneous Internet retransmission by a broadcaster of its AM/FM signal was not exempt from copyright liability under 17 U.S.C. § 114(d)(1)(A). See *Bonneville v. Peters*, Civ. Action No. 01-0408 (E.D. Pa. Aug. 1, 2001), affirming *Public Performance of Sound Recordings*, 65 Fed. Reg. 77,292 (Dec. 11, 2000).

[6] Finding support in the plain language of the statute and in legislative history, broadcasters argue that AM/FM streaming transmissions constitute "broadcast transmissions" covered by the statutory exemption. Consequently, broadcasters are not subject to copyright liability for their simultaneous streaming of their AM/FM signals, and

The RIAA also mischaracterizes the requirements under the Interim Regulations in its statement that "[m]uch of the data in the proposed regulations is identical to that required by the Original Determination."[7] Less than half of the data requested under the proposed regulations were required under the Interim Regulations. The Interim Regulations only required ten (10) fields of information under the "Intended Playlist," as compared to the eighteen (18) fields of information under the proposed regulations.[8] Moreover, the Interim Regulations did not require services to maintain the "Listener's Log" or the "Ephemeral Phonorecord Log" requirements that are proposed in the NPRM.

The RIAA also overstates in its initial comments when it opines: "It is reasonable to conclude, therefore, that any service operating under a statutory license or exemption after June 24, 1998, the date the Copyright Office published the Original Determination, did so with full knowledge of its likely obligation to provide similar data reporting."[9] As mentioned above, until a date well after the adoption of the Interim Regulations, broadcasters, including the College Broadcasters, believed their simultaneous streaming of their AM/FM signals were exempt from the statutory licenses. Commercial broadcasters' inability to comply with the proposed recordkeeping requirements[10] supports the College Broadcasters' identical claim, as the College Broadcasters and their non-commercial peers all have far fewer resources than the commercial broadcasters. Furthermore, a large number of noncommercial educational radio stations have only recently become aware of the scope of the requirements under the statutory licenses. Due to

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would not be subject to licensing fees, terms, or recordkeeping requirements. A contrary finding would upset the mutually beneficial promotional value that radio airplay generates for the recording industries and broadcasters.

[7] RIAA Comments at 3.

[8] 37 C.F.R. § 201.36.

[9] RIAA Comments at 3.

[10] *See* Joint Comments of Radio Broadcasters, *Bonneville International Corporation, et al.*, Docket No. 2002-1 Comment No. 31, p. 33 (Apr. 5, 2002) ("Radio Broadcasters' Comments").

the ancillary nature of streaming services and the predominantly non-professional student/volunteer staff at noncommercial educational radio stations, these broadcasters are less familiar with (and do not have the resources to explore) unresolved legal requirements related to webcasting and with the intricacies of evolving copyright policy related to the Internet.

The RIAA further states in its initial comments that, "Thus, history rather than hysteria should serve as a guide to the Copyright Office in this proceeding."[11] While this statement makes for a clever sound bite, history in no way supports the RIAA claim that "the 'burden' of providing detailed reports of use did not thwart, hinder or cripple the development of such services."[12] At no point does the RIAA produce concrete evidence of consistent compliance with the recordkeeping requirements under the Interim Regulations by services that are still in webcasting. In fact, in the February 20, 2002 decision of the Copyright Arbitration Royalty Panel ("CARP") recommending webcasting rates under the same statutory licenses, the CARP references admissions of the RIAA to the contrary:

> However, as RIAA apparently concedes, some services may not currently possess the proper software, or technical expertise, to track or calculate accurately their performances of sound recordings. Accordingly, as RIAA proposes, statutory licensees should be permitted to make a reasonable estimate of the number of their performances until such time as they can reasonably be expected to acquire the software and expertise.[13]

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[11] RIAA Comments at 4.

[12] *Id.*

[13] Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 & 2 (2002), p. 109 (citations omitted) (the "CARP Report").

Moreover, scores of webcasters have already ceased operation, as abundantly reported in the popular press, in response to the proposed rules and the CARP Report.[14] The College Broadcasters believe that the data submitted to the Office under its initial comments filed in response to the NPRM (the "College Broadcasters Comments") sufficiently proves the point that the proposed recordkeeping requirements are overly burdensome and would jeopardize the College Broadcasters' ability to continue webcasting activities.[15] The College Broadcasters urge the Office to start afresh with the NPRM and to reject the argument of the RIAA that issues under the Interim Regulations should not be revisited.

B. The Proposed "Uniform Report of Performances" Does Not Alleviate the Burden.

The new "Uniform Report of Performances" proposed by the RIAA in its initial comments (the "Uniform Report") replaces the "Intended Playlist" and the "Listener's Log" proposed under the NPRM recordkeeping requirements and also requires the reporting of eighteen (18) separate fields of information. The RIAA has eliminated the Listener's Log and certain fields of information under the Intended Playlist: (i) the time zone in which transmission originated; (ii) the recording label; and (iii) copyright owner information.[16] The RIAA has

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[14] *See* Kim Campbell, *Fees Threaten To Silence Web Radio*, The Christian Science Monitor, Apr. 4, 2002, at 17; William Glanz, *Web Radio Faces Dead Air*, The Washington Times, Apr. 15, 2002, *at* http://www.washingtontimes.com/businesstimes/20020415-68509696.htm (reporting that the number of standard radio stations streaming their signals to the Internet has reduced from approximately 5,700 to 4,600 in large part due to the impending high cost of compliance with DMCA). Several college radio stations have already been forced to shut down their webcasting operations in anticipation of the Office's DMCA decisions, including those at Clemson University (WSBF), New York University (WNYU), Arkansas Tech University (KXRJ), Oregon State University (KBVR), Central Michigan University (WMHW), Bellevue Community College (KBCS), University of Pittsburgh (WPTS), Virginia Tech University (WUVT), Swarthmore College (WSRN), and University of Wisconsin-Whitewater (WSUW). *See* Scott Robertson, *WRPI Faces End of Internet Broadcast*, 122 Polytechnic Online 27 (Apr. 17, 2002), *at* http://poly.union.rpi.edu/article_view.php3?view=1453&part=1; Mark L. Shahinian, *Why College Radio Fears the DMCA*, Salon (Dec. 13, 2001), *at* http://www.salon.com/tech/feature/2001/12/13/college_webcast/print.html.

[15] Joint Comments of College and University Radio Broadcasters Webcasting Under Statutory License, *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 21, p. 15 (Apr. 5, 2002) (the "College Broadcasters Comments").

[16] The College Broadcasters wholeheartedly applaud the RIAA's proposal to eliminate the "Listener's Log" from the statutory reporting requirements. The College Broadcasters believe that collection of such information is both

consolidated into one field (separate fields in the Intended Playlist) the date and time of transmission of a sound recording and added four (4) more fields of information. Two of these new fields of information simply give new names to fields proposed under the Intended Playlist. The "marketing label" field in the Uniform Report corresponds to the identification of the "recording label" field under the Intended Playlist. The "Track Label (P) Line" data field in the Uniform Report is essentially the "copyright owner information" field in the Intended Playlist. As a result, seventeen (17) of the data fields basically have not changed from the Intended Playlist. For the same reasons set forth in the College Broadcasters Comments, collecting and reporting the information that has not changed from the NPRM recordkeeping requirements as well as the information from the additional data fields under the Uniform Report continues to be overly burdensome for the College Broadcasters.[17]

1. The Requested Information in the Uniform Report Is Unavailable.

Except with respect to the eliminated Listener's Log and the three discarded fields of information from the Intended Playlist, the College Broadcasters restate and incorporate by reference in these Reply Comments their statements concerning their inability to collect the information required under the Intended Playlist and the Ephemeral Phonorecord Log. [18] As with data requested under the Intended Playlist, a significant amount of the data proposed under the Uniform Report is either not available to the College Broadcasters or is not consistently

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impractical and illegal. See also Comments of Beethoven.com, *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 23, p. 3 (Apr. 4, 2002) ("there is no certifiable way for webcasters to ensure that data is not collected on consumers which are minors, a collection of data which is expressly prohibited by current laws").

[17] The College Broadcasters otherwise do not object to providing the name of the service and the transmission category. As set forth in the College Broadcasters Comments, the College Broadcasters also do not object to providing the sound recording title, the featured artist and, where available, the record label, as these are the only data fields necessary to administer the statutory licenses.

[18] The College Broadcasters also note that many commercial broadcasters report an inability to comply with the Intended Playlist requirements, many of which are identical to the data requested under the Uniform Report. *See* Radio Broadcasters' Comments at 40-54.

available. For the same reasons set forth in the College Broadcasters Comments with respect to the data required under the Listener's Log, the College Broadcasters would not be able to report the total number of performances of each sound recording.[19] The College Broadcasters find that the influence indicator data field is irrelevant to the simultaneous streaming operations of the College Broadcasters.[20] The College Broadcasters call the attention of the Office to the fact that the RIAA recognizes that certain requested information is unavailable, stating that the requested information "will be included" in the promotional CDs delivered to a service.[21] The RIAA further recognizes the need for the services to find alternative sources for missing information and to research such information in order to comply with the reporting requirements.[22] Because this information not only is not yet available on most compact discs (and certainly not the promotional CDs obtained by the College Broadcasters) but also is not identified on the sound recordings already in the music libraries of the College Broadcasters, the College Broadcasters would have to expend significant resources to research such information and enter the information into a database. As already explored in the College Broadcasters Comments, the College Broadcasters and their peers do not have the budgets to cover the costs of such labor.

[19] Even the RIAA concedes that it is unreasonable to expect a report on "the number of recipients receiving transmissions, assuming such information is not available for a transmission model that is similar to over-the-air radio (i.e., there is no feedback from a recipient's receiving device that informs the service that a particular transmission has been received)." RIAA Comments at 37. Using the RIAA's model of between one and zero listener for calculating the number of performances would create an even worse effective per-performance fee rate for the College Broadcasters, as explored in the College Broadcasters Comments. *See* College Broadcasters Comments at note 21.

[20] Because the Uniform Report would apply to all webcasting services, regardless of the nature of the service, many of the recordkeeping requirements are irrelevant or inappropriate in the context of the College Broadcasters' webcasting operations.

[21] RIAA Comments at 43.

[22] *Id.* at 44.

2. The College Broadcasters Do Not Have the Technical Resources to Comply with the Revised Reporting Requirements.

The reporting proposed by the RIAA seems to be predicated on services that are highly automated, unlike the operations of many of the College Broadcasters. [23] Even for those College Broadcasters with capabilities for computerized programming, current technology and available software does not readily allow the College Broadcasters to provide some of the data fields.[24] The RIAA repeatedly claims that its proposed recordkeeping requirements are reasonable, yet it does not identify a single existing vendor currently able to supply software, at an affordable price, that would facilitate compliance with the proposed recordkeeping requirements. Initial comments by the RIAA chronicle in extreme detail the method by which the collecting entity processes data received.[25] However, the RIAA fails to acknowledge at any point the considerable financial impact from the amount of labor that would be required to collect and report such data.

The RIAA proposals have also repeatedly fallen short in accounting for services that do not make use of automated systems, and for which the use of automated systems is inherently inappropriate. The RIAA fails to recognize the very basic operational conventions of broadcasters, and noncommercial educational radio stations such as the College Broadcasters in

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[23] See the College Broadcasters Comments at 12, 17. See also Comments of WOBC, Oberlin College, *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 24, pp. 1-2 (Apr. 5, 2002); Comments of Mayflower Hill Broadcasting Corporation, licensee of WMHB at Colby College in Waterville, Maine, *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 15, pp. 1-2 (Apr. 4, 2002); Comments of Collegiate Broadcasters, Inc., *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 16, pp. 2-3 (Apr. 4, 2002); Comments of the National Federation of Community Broadcasters, Inc., *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 17, pp. 1&3 (Mar. 29, 2002); Comments of the Honorable Dennis J. Kucinich, Member of Congress, *Notice of Proposed Rulemaking*, Docket No. 2002-1, Comment No. 34, p. 2 (Apr. 5, 2002).

[24] RIAA's proposed 37 C.F.R. § 20136(e)(1)(viii).

[25] RIAA Comments at 28-31.

particular. RIAA's description of webcasters' operations erroneously characterizes all services as being alike:

> It is the service that obtains the recordings, 'rips' those recordings to make reproductions for a database from which transmissions are made and enters the meta data for those sound recordings so that they are identifiable in the database.[26]

This description of typical webcaster operations by the RIAA demonstrates the RIAA's complete lack of understanding of the programming operations of the College Broadcasters and other noncommercial educational student-operated radio stations.[27] Most of the College Broadcasters air musical selections directly from the native recording material – compact discs, vinyl records, or magnetic tape – rather than "ripping" a digital recording into a computer-based automation system. Few of the stations represented by the College Broadcasters maintain electronic "meta data" files of the recordings they air. Those that do make limited use of electronic database files do not have the capabilities to connect this information with their Internet streaming server computers. As explored in the College Broadcasters Comments with respect to the NPRM proposed recordkeeping requirements, the College Broadcasters hardly have the technical means to comply with the Uniform Report.

3. The Voluminous Data Requested Under the Uniform Report is Unnecessary to the Administration of the Statutory Licenses.

As demonstrated by the December 2001 agreement among the RIAA, the Corporation for Public Broadcasting ("CPB") and National Public Radio ("NPR") setting the terms and rates for webcasting by CPB-funded stations discussed in the College Broadcasters Comments (the

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[26] *Id.* at 8.

[27] The RIAA publicly acknowledged its lack of understanding of the College Broadcasters' operations. "Jonathan Lamy, a spokesman for the [RIAA], said of the colleges' complaints, 'We understand their concerns, but we have not yet decided what kind of reporting requirements make sense for noncommercial radio stations.'" Andrea L. Foster, *College Broadcasters Fear Tracking Rule May Force an End to Webcasts*, The Chronicle of Higher Education, Apr. 26, 2002, at A39.

"RIAA/CPB Agreement"), the exhaustive amount of information requested under this NPRM (including the Uniform Report) is not necessary to the effective and efficient administration of the statutory licenses.[28] Under the RIAA/CPB Agreement, based upon information and belief, covered services required to report do not have to report as much data as proposed under the Uniform Report. The RIAA's acceptance of such reduced reporting requirements supports the argument that individual sound recordings can be identified, sufficiently for the purposes of the statute, with significantly fewer than the eighteen (18) data items proposed under the Uniform Report.

The RIAA also dismisses the sampling method for data; however, the RIAA/CPB Agreement reportedly requires recordkeeping of licensed performances for only portions of the broadcast schedule of CPB-funded stations with ten (10) or more full-time employees (as established in the College Broadcasters Comments, CPB-funded stations with fewer than 10 employees have been exempted from *all* recordkeeping requirements under the statutory licenses).[29] Noncommercial educational broadcast stations not supported by CPB should enjoy the same benefits already provided by the RIAA to stations receiving CPB funding. The College Broadcasters strongly urge the Office to conclude that because the RIAA can adequately

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[28] *All CPB-Qualified Radio Stations Covered by ASCAP, RIAA Licenses* (24 Pub. Broadcasting Rep., Issue 1, Jan. 11, 2002), 2002 WL 9859342. *See* College Broadcasters Comments at 22. The initial comments from the RIAA make no reference to the private RIAA/CPB Agreement. The College Broadcasters suppose this omission to be the result of an express prohibition of disclosure binding the parties to that agreement; however, the College Broadcasters further believe that such a term is arguably contrary to the intent of Congress. The CARP proceeding also did not make mention of any specific terms of this voluntary agreement, although the parties entered into this agreement following a negotiation period instigated by the Panel. See CARP Report, p. 17. The College Broadcasters contrast this void with the observation that the CARP Report includes several references to other agreements into which the RIAA voluntarily entered with webcasters, including quotations from more than a few specific redacted passages. Because the terms of the RIAA/CPB Agreement have received no apparent consideration in any previous Copyright Office proceeding, the College Broadcasters believe a review of that agreement in the current action is crucial to a fair determination, even if the Copyright Office chooses to review the agreement "*in camera*."

[29] See *All CPB-Qualified Radio Stations Covered by ASCAP, RIAA Licenses* (24 Pub. Broadcasting Rep., Issue 1, Jan. 11, 2002), 2002 WL 9859342.

distribute royalty fees collected under the RIAA/CPB Agreement, the RIAA could likewise reduce recordkeeping requirements and utilize a sampling system to collect and distribute statutory license fees.

C. The Ephemeral Phonorecord Log Serves No Purpose.

The RIAA regrettably neglects to recognize that the "Ephemeral Phonorecord Log" serves absolutely no purpose under the statute, particularly in the context of simultaneous streaming by broadcasters. In the case of simultaneous streaming activities by noncommercial educational broadcasters, as the College Broadcasters argued earlier in the College Broadcasters Comments, if a log of ephemeral copies could be reasonably generated, such a record would correspond perfectly with the sound recordings identified in the "Intended Playlist," and would therefore be entirely duplicative.[30] Moreover, subject to confirmation by the Office, the College Broadcasters' information suggests that *no* CPB-funded station is required under the RIAA/CPB Agreement to generate a discrete record of ephemeral copies made or destroyed. Again, the willingness of the RIAA to eliminate the recordkeeping with respect to ephemeral copies under the RIAA/CPB Agreement indicates that such a log is not necessary for the proper distribution of license fees or for monitoring of compliance with license terms.

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[30] College Broadcasters' Comments at p. 14.

II. Reply to the Initial Comments of the AFM and AFTRA.

A. The AFM/AFTRA Proposed Additional Reporting Requirements Increase the Burden of Reporting.

1. Additional Reporting Information Is Not Available to the College Broadcasters

AFM and AFTRA principally propose to require services to provide additional information regarding non-featured musicians and vocalists on sound recordings.[31] The College Broadcasters strenuously object to the addition of any more fields of information under the proposed regulations for recordkeeping under the statutory licenses. Such additional information would not be consistently available to statutory licensees for the same reasons previously discussed at length by the College Broadcasters and by others in their initial comments to the NPRM. Even when such information is available, adding another data field to the already overly burdensome eighteen (18) fields of information requested per sound recording performed would be completely unreasonable. The College Broadcasters acknowledge that a portion of license fees is to be collected under the statutory licenses to be distributed to non-featured artists. Nevertheless, the statute requires webcasters to provide only *reasonable* notice of the use of sound recordings, not *exhaustive* notice.[32] To the extent that reporting allows the designated collective to distinguish one sound recording from another (i.e., by providing title and featured artist), the services have fully complied with the requirements of the statute. For the same reasons set forth in the College Broadcasters Comments, the burden should be on the designated collective to fill in the missing information.

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[31] AFM/AFTRA Comments, p. 2.

[32] 17 U.S.C. § 114(f)(4)(A).

2. The RIAA Already Possesses Much of the Requested Information.

The RIAA states in its initial comments that its member companies "create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States...."[33] As the industry representative for its member companies, the RIAA has already compiled an extensive database of information on sound recordings owned by its member companies. The RIAA should make this information available to the designated collective to find the information the RIAA, AFM, and AFTRA claim is necessary to administer the statutory licenses. The College Broadcasters support the proposal of the Digital Media Association in its initial comments to the NPRM to extend the proceedings under the NPRM to explore the use of copyright owner-supplied information in combination with the cost-efficient use of a common database.[34] The College Broadcasters contend that the effective use of a common database of information supplied by RIAA's member companies could facilitate the reporting process as well as the collection and distribution of license fees.

III. The Office Should Create a Special Exemption for the Recordkeeping Requirements for Noncommercial, Non CPB-Funded Educational Radio Stations.

The proposed recordkeeping requirements, even as modified by the RIAA, have been proven by the College Broadcasters and others to be oppressive for small student-operated educational radio stations. A clear precedent for relief has been established in the voluntary RIAA/CPB Agreement. For the same reasons set forth in the College Broadcasters Comments, the Office should exempt from the statutory recordkeeping requirements small noncommercial radio stations licensed to high schools, colleges and universities and other nonprofit educational institutions in the same way that the RIAA/CPB Agreement exempts CPB-funded

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[33] RIAA Comments at 1.

[34] Comments of the Digital Media Association, *Notice of Proposed Rulemaking*, Docket No. 2002-1 Comment No. 20 at p. 3 (Apr. 5, 2002).

noncommercial radio stations with fewer than ten (10) full-time employees from recordkeeping requirements. The College Broadcasters reiterate that the minimum fee for exempted noncommercial broadcasters should be appropriately reduced to a low blanket fee similar to those established under 17 U.S.C. § 118 statutory licenses.[35]

IV. Alternatively, the Office Should Establish Narrowly Tailored Recordkeeping Requirements for Noncommercial, Non-CPB-Funded Educational Radio Stations.

If the Office denies the request of the College Broadcasters for such an exemption, the evidence plainly supports a significant reduction from the onerous requirements proposed in the NPRM and more recently revised in the proposed Uniform Report. The College Broadcasters as well as many other commenters to the NPRM have presented rational persuasive arguments for replacing a census model of data collection with a sampling model. As the RIAA has accepted a sampling model for even the largest of CPB-funded broadcasters, certainly other noncommercial educational broadcasters deserve the same consideration.

CONCLUSION

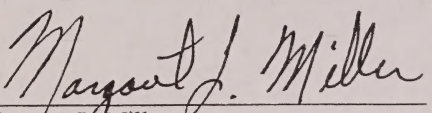
For the reasons set forth above, the College Broadcasters again strongly urge the Office to exempt the College Broadcasters and all other non-CPB-funded, noncommercial educational radio stations with fewer than ten (10) full-time equivalent employees that are licensed to colleges, universities and other nonprofit educational institutions from the recordkeeping requirements proposed in the NPRM and the initial comments of the RIAA, AFM and AFTRA thereto; or, alternatively, to reduce significantly their recordkeeping requirements under statutory

[35] College Broadcasters' Comments at 23.

license to include only sound recording title, featured artist, and, where available, record label, to be provided on a sampling basis.

Dated: April 26, 2002

Respectfully submitted,



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